92-591

No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN M. POINDEXTER, RESPONDENT

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR A WRIT OF CERTIORARI

LAWRENCE E. WALSH
Independent Counsel

ANDREW L. FREY
CHARLES ROTHFELD
Associate Counsel
Office of Independent Counsel
555 Thirteenth Street, N.W.
Suite 701 West
Washington, D.C. 20004
(202) 383-8940

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QUESTIONS PRESENTED

1. Whether 18 U.S.C. 1505 is unconstitutionally vague.

2. Whether circumstantial evidence may be used to establish that a witness who has been exposed to immunized testimony was not affected by that exposure.

3. Whether the evidence of witnesses who have a present, independent recollection of events must be excluded from consideration by the jury when exposure to immunized testimony might have had an influence on the witnesses' thinking "for which they cannot at this time consciously account."

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PETITION FOR A WRIT OF CERTIORARI

The Independent Counsel, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-25a) is reported at 951 F.2d 369. The principal opinion of the district court (App., *infra*, 56a-125a) is unreported. An earlier opinion of the district court (App., *infra*, 138a-167a) is reported at 727 F. Supp. 1488.

JURISDICTION

The judgment of the court of appeals was entered on November 15, 1991, and a timely petition for rehearing was denied on July 8, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant portions of the Fifth Amendment to the United States Constitution and 18 U.S.C. 1505 and 6002 are set out in an appendix to this petition.

STATEMENT

After a three week trial, respondent John M. Poindexter was convicted on two counts of obstructing a congressional inquiry in violation of 18 U.S.C. 1505 (Counts 2 and 3), two counts of making false statements in violation of 18 U.S.C. 1001 (Counts 4 and 5), and one count of conspiring to commit the offenses specified in the other counts and to destroy official documents of the United States, in violation of 18 U.S.C. 371. He was sentenced to six months' imprisonment on each count, the sentences to run concurrently. The convictions were set aside on appeal.

1. According to the evidence at trial, the offenses of which Poindexter was convicted grew out of a series of transactions generally known as the "Iran/Contra affair." Poindexter, who served as Assistant to the President for National Security Affairs (or "National Security Advisor"), acted in concert with several others—prominent among them Oliver North, a member of the National Security Council staff—in a lengthy campaign to deceive Congress about a range of government activities associated with that affair. See generally App., *infra*, 57a-60a n.2.

In October 1984, Congress barred United States intelligence agencies from providing military support to forces (popularly known as "Contras") seeking to overthrow the government of Nicaragua. Shortly afterwards, North, with Poindexter's knowledge and support, initiated an extensive operation to provide just such assistance to the Contras. See App., *infra*, 57a-58a n.2; JA 1261-1263, 1294-1295, 2307-2310, 2315, 2533, 2572, 2589.[1] When

[1] "JA" refers to the joint appendix in the court of appeals.

questioned about these activities by three committees of the House of Representatives, Poindexter responded with letters that made false and misleading representations denying that the United States provided the Contras with military support. App., *infra*, 68a-69a. Poindexter also arranged for North to meet with representatives of the House Intelligence Committee. At the meeting, North falsely denied assisting the Contras; afterwards, Poindexter congratulated North on a job "Well Done." *Id.* at 69a; JA 2411.

In November 1985, while the Contra operation was underway, Poindexter became involved in the "Iran" element of the affair. At that time Poindexter was drawn into a plan to ship missiles to Iran in the hope of obtaining Iranian assistance for the release of American hostages being held in Lebanon. App., *infra*, 58a n.2; JA 2350-2352. In late November or early December 1985 President Reagan signed a Covert Action Finding (a so-called "Presidential Finding") retroactively authorizing the shipment and expressly indicating that it was meant to facilitate the release of the hostages. App., *infra*, 58a n.2.[2] Some of the proceeds from the Iranian arms sales ultimately were used to benefit the Contras.

Poindexter's deceptions began to unravel in early November 1986, when press reports appeared stating that the United States had exchanged arms for hostages with Iran. The House and Senate Intelligence Committees demanded meetings with Poindexter to obtain an explanation of the affair. JA 2439-2445. Prior to the meetings, Poindexter, North, and others created a false chronology stating that American officials had not known before January 1986 that the November 1985 shipment to Iran contained missiles (App., *infra*, 70a-71a; JA 2454); an

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[2] To deemphasize the finding's language about the exchange of arms for hostages, Poindexter and North subsequently obtained a second finding to cover future shipments of missiles to Iran. This finding, signed by President Reagan in January 1986, portrayed the arms sales principally as an effort to support moderate elements in the Iranian government. JA 2368.

acknowledgement of American involvement in that shipment might have triggered a search for the initial Presidential Finding, which would have revealed the character of the transaction as an exchange of arms for hostages. JA 1864-1865.

In late November 1986, Poindexter held separate meetings with the House and Senate Intelligence Committees. At these meetings, Poindexter gave a false account of the dealings with Iran that closely paralleled the one outlined in the deceptive chronology. App., *infra*, 59a n.2, 73a-75a; JA 2473-2481, 2488. Afterwards, upon learning that the Attorney General had begun an investigation of the affair, Poindexter deleted from his office computer some 5000 files, many of which evidenced his own involvement in the Iran/Contra affair. App., *infra*, 59a n.2, 71a-72a; JA 1704-1709. With North in attendance, Poindexter also destroyed the November 1985 Presidential Finding, which contained what was regarded as embarrassing language about the exchange of arms for hostages. App., *infra*, 59a n.2; JA 1594-1595, 1598-1600.

On December 19, 1986, an Independent Counsel was appointed in this case pursuant to 28 U.S.C. 593(b). A grand jury was empaneled on January 28, 1987. Congress, meanwhile, commenced its own investigation of the Iran/Contra affair. Poindexter received use immunity in connection with this investigation pursuant to 18 U.S.C. 6002. He began public immunized testimony on July 15, 1987.

Poindexter was indicted on March 16, 1988. Two counts charged violations of 18 U.S.C. 1505, which in relevant part subjects to punishment anyone who

> corruptly * * * influences, obstructs, or impedes or endeavors to influence, obstruct or impede the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States, or the due and proper exercise of the power of inquiry under which any inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress * * * .

One of the Section 1505 counts charged that Poindexter obstructed Congress by sending the letters that made false and misleading representations regarding North's assistance to the Contras, and by arranging the meeting at which North gave false answers to the House Intelligence Committee; the other charged that Poindexter obstructed congressional inquiries by participating in the creation of the false chronology, by deceiving the House and Senate Intelligence Committees in November 1986 about the arms shipments to Iran, and by deleting the files from his office computer. Two additional counts charged that Poindexter violated 18 U.S.C. 1001 by making the false statements to the House and Senate Intelligence Committees in November 1986. A fifth count charged Poindexter with violating 18 U.S.C. 371 by conspiring both to commit the offenses charged in the other counts and to destroy official documents of the United States.

2. Prior to trial, the district court sought to implement the mandate of this Court's decision in *Kastigar* v. *United States*, 406 U.S. 441 (1972), by taking extensive steps to ensure that Poindexter's immunized statements were not used against him. After reviewing statements that had been made by potential trial witnesses before Poindexter's immunized testimony became publicly available (JA 349, 2231), the court found that all of the proposed testimony of most of these witnesses "had been memorialized prior to July 15, 1987" (App., *infra*, 157a) and therefore could not have been affected by Poindexter's immunized disclosures. *Id.* at 77a-78a. As for those witnesses whose trial testimony would not be limited to that memorialized—or, in the vernacular, "canned"—prior to Poindexter's congressional appearance, the district judge found that the proposed trial testimony of most of them concerned subjects that Poindexter did not address in his immunized statements or involved "only insubstantial elaborations of information the witness had furnished prior thereto." *Id.* at 158a. At the same time, the court found that the prosecutors had not been exposed in any significant respect to the immunized testimony. *Id.* at 151a-155a.

This left the government still to prove that five of its potential witnesses were free of taint. The district judge ordered these witnesses to appear at a pretrial *Kastigar* hearing. App., *infra*, 78a, 159a. Of the three of these witnesses who subsequently testified at trial, two credibly affirmed that their anticipated trial testimony would not "in any way [be] affected by Admiral Poindexter's immunized testimony." JA 654-655. See App., *infra*, 159a-163a; JA 635, 637, 640, 654-655, 666, 669, 671, 675, 689.

The third witness, Oliver North, took a different tack. He stated at the *Kastigar* hearing that "he was unable, with respect to *any* subject, to distinguish between what he had personally done, observed, or experienced and what he had heard about the events by way of Poindexter's immunized testimony." App., *infra*, 83a (emphasis added). As for Poindexter's destruction of the November 1985 Presidential Finding—an important piece of information, since it suggested Poindexter's possession of a motive to deceive Congress—North acknowledged that he had seen Poindexter destroy a piece of paper, but insisted that he did not know that the document was the finding until Poindexter stated that fact before Congress. JA 904, 967, 969, 1015-1016.

Although deeply "skeptical" regarding North's claims, the trial court initially ruled that North would be permitted to give only limited testimony. App., *infra*, 164a. Subsequently, however, the district court rejected North's testimony at the *Kastigar* hearing as incredible. *Id.* at 133a-137a. Basing its ruling on North's demeanor, on inconsistencies in North's testimony, and on other objective indicia that North had an untainted memory of events, the court found that North "appears to have been embarked at that time upon the calculated course of attempting to assist his former colleague and co-defendant * * * by prevaricating on various issues, including most notably the issue whether he had to rely for his recollection of events on Poindexter's immunized testi-

mony." *Id.* at 133a (footnote omitted).[3] North accordingly was permitted to testify. Poindexter was convicted on all counts.

3. a. A divided court of appeals reversed the convictions. App., *infra*, 1a-55a. The majority initially concluded that all of the convictions had to be set aside because, in its view, the trial court's measures failed to ensure that Poindexter's immunized testimony was not used against him at trial. In reaching this conclusion, the court of appeals restated the standard set out in *United States* v. *North*, 910 F.2d 843 ("*North I*"), modified, 920 F.2d 940 (D.C. Cir. 1990) ("*North II*"), cert. denied, 111 S. Ct. 2235 (1991): "that a prohibited 'use' [of immunized testimony] occurs if a witness's recollection is refreshed by exposure to the defendant's immunized testimony, *North I*, 910 F.2d at 860-61, or if his testimony is in any way 'shaped, altered, or affected,' by such exposure, *id.* at 863." App., *infra*, 7a-8a. Under this standard, the court explained, " 'the government must demonstrate affirmatively that the immunized testimony did not * * * [have] an influence on [the trial witnesses'] thinking, even one for which they cannot at

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[3] The court explained the basis for this conclusion in considerable detail. A "critical factor leading to the Court's credibility determination was North's demeanor at the * * * *Kastigar* hearing," which the trial judge found "evasive, disingenuous, and argumentative"—in all, the demeanor "of a witness who is not telling the truth." App., *infra*, 85a. The judge also found that North's testimony at his own trial (which predated the Poindexter *Kastigar* hearing) contained substantial detail that was different from, or contradicted, Poindexter's immunized disclosures, thereby suggesting North's possession of a substantial independent recollection of events. *Id.* at 86a-89a & n.48. So far as the Presidential Finding was concerned, the court determined that North's testimony at his own trial was inconsistent with his assertion at the *Kastigar* hearing that he had not been aware of the nature of the destroyed document. And the court found it "inherently incredible" that North did not remember "his participation in an event he witnessed first hand that was as dramatic, indeed historic, as the tearing up of an extremely rare Presidential Finding." *Id.* at 84a.

this time consciously account.'" *Id.* at 10a (citation omitted).

Although this case was tried prior to the decision in *North*, the court of appeals declined to remand for new findings under the *North* standard. App., *infra*, 11a.[4] Focusing on North's testimony (see *id.* at 12a-17a), the court held that the district judge's finding that North lied when he denied having an independent recollection could not be used to support the proposition that North *did* have an untainted memory. *Id.* at 15a. The court of appeals also went on to reason that the district judge's finding of differences between North's account and Poindexter's immunized testimony was irrelevant, opining that a "substantially exposed witness" who has not "canned" his testimony may give evidence at trial only when he "persuasively claim[s] that he can segregate the effects of his exposure." *Id.* at 16a.

b. Having set aside all the convictions, the court of appeals went on to bar reprosecution on the two counts charging violations of Section 1505, which proscribes "corruptly" endeavoring to impede a congressional inquiry. The court held the statute unconstitutionally vague as applied to Poindexter. Its analysis began with the proposition "that, on its face, the word 'corruptly' is vague." App., *infra*, 20a. The court went on to find that neither the legislative history nor prior judicial constructions of Section 1505 put Poindexter on notice that lying to Congress in order to confound its inquiries falls within the statutory proscription. *Id.* at 34a. The court left open the possibility that Section 1505 might

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[4] Poindexter had been indicted together with North; the court of appeals held in *North* that the indictment may have been tainted. See 910 F.2d at 853-873. The court restated that holding here. App., *infra*, 17a-18a. So far as the indictment is concerned, however, the court did remand the case so that the government could attempt to show "that the evidence received by the grand jury was untained, or that any taint was harmless beyond a reasonable doubt." *Ibid.*

constitutionally be applied to "transitive" conduct (*id.* at 23a) or to "subornation" (*id.* at 37a), where the defendant corrupts *someone else* by influencing that person "(through bribery or otherwise) to violate a legal duty." *Ibid.* But such an interpretation "would still not cover the conduct at issue on this appeal—making false and misleading statements to the Congress." *Id.* at 39a.

c. Chief Judge Mikva dissented in part. App., *infra*, 46a-55a. Although he did not take issue with the *North* standard, he complained that in *North* "the Court changed the standards the special prosecutor had to meet; today we refuse to let him try to meet them." *Id.* at 46a. The majority's failure to accord any weight to the district judge's credibility findings, Chief Judge Mikva added, "tells future defendants that all they need to evade responsibility [to testify at trial] is a well timed case of amnesia." *Id.* at 50a. The dissent also took issue with the court's holding on Section 1505, finding it "obvious * * * that Poindexter 'corruptly' obstructed the congressional investigation when he lied to Congress." *Id.* at 51a.

REASONS FOR GRANTING THE PETITION

The ruling below resolved two issues that hold great importance both for the administration of justice and for the conduct of the business of Congress and of federal agencies. The court of appeals' decision to declare 18 U.S.C. 1505 unconstitutional as applied to an important class of obstructive activities leaves a large gap in the criminal law, while endorsing a method of analyzing constitutional vagueness challenges that could prove enormously destructive to a substantial body of federal legislation. At the same time, the Fifth Amendment holding—which goes far beyond the earlier ruling in *North*—erects substantive and procedural obstacles of unprecedented strictness to the prosecution of persons who have given public immunized testimony. That rule will frustrate both congressional oversight and criminal prosecution of a substantial range of wrongful conduct. Review by this Court therefore is in order.

A. Section 1505 Is Not Unconstitutionally Vague

In holding Section 1505 unconstitutional as applied to all cases that do not involve subornation, the court of appeals suggested neither that Poindexter's conduct fell outside the plain terms of Section 1505 nor that Poindexter actually might have believed his conduct to be legal.[5] Instead, the court began with the proposition "that, on its face, the word 'corruptly' is vague." App., *infra*, 20a. See *id.* at 21a-22a. It then found that this supposed vagueness was not dispelled either by the statute's legislative history (see App. *infra* at 22a-34a) or by its prior judicial constructions. *Id.* at 34a-37a.

In our view, this decision—which held facially vague a term ("corruptly") that appears in some 18 federal criminal statutes, and declared unintelligible to ordinary persons a provision whose antecedents run back (in something very like its present form) more than 160 years[6]—may fairly be characterized as astonishing. It renders nugatory a law that is of central importance in combatting corrupt and obstructive behavior. It invites con-

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[5] In fact, the jury found that Poindexter was *aware* of the illegality of his conduct. The jury was charged that "[t]he word corruptly means having the * * * improper purpose of obstructing the inquiry, that is, having the specific intent unlawfully to impair, obstruct, or impede the inquiry, *with knowledge that the conduct was unlawful*." JA 2131, 2184 (emphasis added). See also JA 2126, 2175. While we doubt that knowledge of illegality actually is an element of the offense under Section 1505 (see *North I*, 910 F.2d at 884), the instruction and verdict here make clear the jury's conclusion that Poindexter was not in fact taken unawares by the application of the statute to his activity.

[6] As the court of appeals itself noted (App., *infra*, 25a), Section 1505's origins ultimately are traceable to a provision enacted in 1831, which is the direct predecessor of the obstruction of justice statute now codified at 18 U.S.C. 1503. The 1831 provision subjected to punishment persons who "corruptly, or by threats or force, endeavour to influence, intimidate, or impede any juror, witness, or officer, in any court of the United States, in the discharge of his duty, or shall, corruptly, or by threats or force, obstruct, or endeavour to obstruct or impede, the due administration of justice therein." Act of Mar. 2, 1831, c.98, § 2, 4 Stat. 487.

tinuing litigation regarding the constitutionality of the many other statutes drawn in similar terms. It adopts an insupportably expansive approach to the void-for-vagueness doctrine, which, this Court repeatedly has emphasized, "is not a principle designed to convert into a constitutional dilemma the practical difficulties of drawing criminal statutes * * *." *Colten* v. *Kentucky*, 407 U.S. 104, 110 (1972). And not surprisingly, it cannot be reconciled with decisions of this and other courts.

1. While the court below labeled Poindexter's vagueness argument "compelling" (App., *infra*, 22a), other courts have found identical contentions so insubstantial as barely to warrant discussion. Two courts of appeals nevertheless have had occasion expressly to reject vagueness attacks on Section 1505, explaining that the statutory "language is more than adequate to forewarn a reasonable person that any attempt to improperly influence a congressional investigation is illegal." *United States* v. *Mitchell*, 877 F.2d 294, 299 n.5 (4th Cir. 1989). See *United States* v. *Leo*, 941 F.2d 181, 199 (3d Cir. 1991) ("reject[ing] [the defendant's] contention that the statute did not give him fair notice that his conduct was prohibited").[7] Because neither of these cases presented what the court below termed the "subornation" or "transitive" paradigm (App., *infra*, 37a, 23a)—*Leo* involved a false statement by the defendant himself (see 941 F.2d at 187, 198) and *Mitchell* a direct attempt by the defendants to pretermit a congressional investigation (see 877 F.2d at 297, 299-300)—both are flatly inconsistent with the holding below.

Similarly, three other courts of appeals have held that the virtually identical language of the so-called "omnibus clause" of 18 U.S.C. 1503,[8] Section 1505's companion ob-

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[7] In fact, the defendant in *Leo* evidently had no doubt about the meaning of the term "corruptly"; instead, he directed his vagueness challenge to Section 1505's use of the phrase "pending proceeding." See 941 F.2d at 198-199.

[8] The initial clauses of Section 1503 reach persons who either injure or "corruptly, or by threats or force, or by any threatening

struction of justice provision, provides "fair and conspicuous notice of what behavior it interdicts." *United States* v. *Cintolo*, 818 F.2d 980, 997 (1st Cir.), cert. denied, 484 U.S. 913 (1987). See *United States* v. *Jeter*, 775 F.2d 670, 677-679 (6th Cir. 1985), cert. denied, 475 U.S. 1142 (1986); *United States* v. *Griffin*, 589 F.2d 200, 206-207 (5th Cir. 1978) (Wisdom, J.), cert. denied, 444 U.S. 825 (1979); *Anderson* v. *United States*, 215 F.2d 84, 90 (6th Cir.), cert. denied, 348 U.S. 888 (1954). Those decisions also cannot also be reconciled with the holding below.[9]

In addition, the D.C. Circuit's holding would have required different outcomes in numerous cases in which other courts (including at least six courts of appeals) affirmed the convictions under Section 1505 of defendants who made false statements, concealed evidence, or otherwise obstructed inquiries by means that were not "transitive" and did not amount to subornation. Some of these decisions flatly held that the use of "false and evasive" statements is proscribed by the "plain meaning" of the statutory language. *United States* v. *Alo*, 439 F.2d 751, 753 (2d Cir.), cert. denied, 404 U.S. 850 (1971). See *Leo*, 941 F.2d at 198 (Section 1505 "cover[s] false statements to a federal auditor"). In others, the defendants failed even to suggest that Section 1505 did not reach their conduct and the courts found it unnecessary expressly to discuss the question, which shows how little doubt has existed

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letter or communication," endeavor to influence grand or petit jurors or court officers. The concluding omnibus clause subjects to punishment any person who "corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice."

[9] Indeed, so far as we are aware *every* court to consider the question in any setting has held that the term "corruptly" is not unconstitutionally vague. See *United States* v. *McElroy*, 910 F.2d 1016, 1022 (2d Cir. 1990) (rejecting vagueness challenge to 18 U.S.C. 215(a)); *United States* v. *Pommerening*, 500 F.2d 92, 97 (10th Cir.) (rejecting vagueness challenge to 18 U.S.C. 201(b)), cert. denied, 419 U.S. 1088 (1974).

about the scope of the statute.[10] The court below disregarded that uniform judgment of the legal community.

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[10] See *United States* v. *Schwartz*, 924 F.2d 410, 422-423 (2d Cir. 1991) (false statements); *United States* v. *Bejasa*, 904 F.2d 137, 139 (2d Cir.) (false statements), cert. denied, 111 S. Ct. 299 (1990); *United States* v. *Tallant*, 547 F.2d 1291, 1299 n.18 (5th Cir.) (presentation of false records), cert. denied, 434 U.S. 889 (1977); *United States* v. *Fruchtman*, 421 F.2d 1019, 1020-1022 (6th Cir.) (submitting false documents), cert. denied, 400 U.S. 849 (1970); *United States* v. *Laurins*, 857 F.2d 529, 536-537 (9th Cir. 1988) (concealing documents), cert. denied, 492 U.S. 906 (1989); *United States* v. *Vixie*, 532 F.2d 1277, 1278 (9th Cir. 1976) (submitting false documents); *United States* v. *Victor Teicher & Co.*, 726 F. Supp. 1424, 1437-1438 (S.D.N.Y. 1989) (false statements); *United States* v. *Berg*, 710 F. Supp. 438, 440, 445 (E.D.N.Y. 1989) (false statements); *United States* v. *Naserkhaki*, 713 F. Supp. 190, 192 (E.D. Va. 1989) (false statements; motion to dismiss indictment denied); *United States* v. *Lord*, 710 F. Supp. 615, 616, 618 (E.D. Va. 1989) (false statements), aff'd, 902 F.2d 1567 (4th Cir. 1990); *United States* v. *Presser*, 187 F. Supp. 64, 66 (N.D. Ohio 1960) (destroying and concealing documents).

The courts also generally have had no trouble applying Section 1503's omnibus clause to false statements or other conduct not amounting to subornation. See, *e.g.*, *United States* v. *Langella*, 776 F.2d 1078, 1081 (2d Cir. 1985) (perjury and concealment of evidence by lying), cert. denied, 475 U.S. 1019 (1986); *United States* v. *Cohn*, 452 F.2d 881, 883-884 (2d Cir. 1971) (false and evasive testimony), cert. denied, 405 U.S. 975 (1972); *United States* v. *Williams*, 874 F.2d 968, 976-982 (5th Cir. 1989) (false or evasive testimony); *Griffin*, 589 F.2d at 204-205 (Wisdom, J.) (perjurious and evasive testimony; "[w]hether [the defendant's] testimony is described in the indictment as 'evasive' because he deliberately concealed knowledge or 'false' because he blocked the flow of truthful information is immaterial"); *United States* v. *Howard*, 569 F.2d 1331, 1334-1336 (5th Cir.) (sale of grand jury minutes), cert. denied, 439 U.S. 834 (1978); *United States* v. *Jeter*, 775 F.2d at 676-677 (sale of grand jury minutes); *United States* v. *Gonzalez-Mares*, 752 F.2d 1485, 1491 (9th Cir.) (false statements), cert. denied, 473 U.S. 913 (1985); *United States* v. *Rasheed*, 663 F.2d 843, 851-852 (9th Cir. 1981) (concealing documents), cert. denied, 454 U.S. 1157 (1982); *United States* v. *Thomas*, 916 F.2d 647, 652 (11th Cir. 1990) (false statements); *United States* v. *Perkins*, 748 F.2d 1519, 1528 (11th Cir. 1984) ("false or evasive testimony"); *United States* v. *Gregory*, 611 F. Supp. 1033, 1039 (S.D.N.Y. 1985) (Weinfeld, J.) ("perjured testimony *is* obstruction of justice,"

2. As the frequency and scope of its application suggests, the invalidation of Section 1505 as applied to a broad range of obstructive conduct will have very significant practical consequences. The court of appeals nevertheless seemed untroubled by the prospect of debilitating the principal weapon against obstruction of Congress and of federal agencies, noting that false statements made to federal officials are subject to prosecution under 18 U.S.C. 1001. See App., *infra*, 20a. But Section 1001 does not fill the gap left by the holding below. Many common forms of obstructive behavior—such as concealing or destroying evidence, conduct actually undertaken by Poindexter in this case and charged in Count 3—fall outside the scope of that statute.[11]

In fact, Section 1505 and its companion obstruction provisions were enacted precisely because proscriptions against specific types of misconduct are inadequate to accomplish the congressional purpose: "The obstruction of justice statute was drafted with an eye to the variety of corrupt methods by which the proper administration of justice may be impeded or thwarted, a variety limited

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although Section 1503 count dismissed as multiplicitous); *United States* v. *Muniz*, 690 F. Supp. 482, 488 (E.D. Va. 1988) (false testimony); *United States* v. *Caron*, 551 F. Supp. 662, 667 n.6 (E.D. Va. 1982) (false statements), aff'd mem. 772 F.2d 739 (4th Cir. 1983), cert. denied, 465 U.S. 1103 (1984).

[11] In addition to the false statement offense, Section 1001 makes it a crime to "conceal[] or cover[] up by any trick, scheme, or device" a material fact within the jurisdiction of a federal department. But the courts have given this provision a restrictive interpretation, holding that "[g]enerally, concealment violations under § 1001 relate to the nondisclosure of statements required by statute, government regulation, or form." *United States* v. *Tobon-Builes*, 706 F.2d 1092, 1096 (11th Cir. 1983). See *United States* v. *Anzalone*, 766 F.2d 676, 683 (1st Cir. 1985); *United States* v. *Nersesian*, 824 F.2d 1294, 1312 (2d Cir.), cert. denied, 484 U.S. 958 (1987); *United States* v. *Larson*, 796 F.2d 244, 246 (8th Cir. 1986); *United States* v. *Irwin*, 654 F.2d 671, 679 (10th Cir. 1981), cert. denied, 455 U.S. 1016 (1982). It therefore is doubtful that the statute could be stretched to reach much of the conduct undertaken by Poindexter here.

only by the imagination of the criminally inclined." *Mitchell*, 877 F.2d at 299 (citations and internal quotation marks omitted). These statutes thus have been used to reach conduct as varied as, for example, arranging an unnecessary operation to cause a mistrial (see *United States* v. *Minkoff*, 137 F.2d 402 (2d Cir. 1943)) or planting illegal liquor in a crime victim's premises to discredit the victim as a witness. See *Knight* v. *United States*, 310 F.2d 305 (5th Cir. 1962). The decision below would leave no statutory proscriptions against such activities, or against Poindexter's less imaginative (if equally harmful) misconduct.[12]

3. In addition, the effect of the decision below may be expected to reach well beyond Section 1505. At least 17 other federal criminal statutes use the word "corruptly" to define an element of the offense. Five of these are obstruction statutes that apply the word in a manner that is almost identical to, or otherwise closely parallels, Section 1505.[13] The other statutes appear throughout the U.S. Code, ranging from provisions that address foreign corrupt practices to those that concern the destruction of vessels to one that prohibits perjury before consular officers.[14]

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[12] The court of appeals' holding, moreover, will do more than interdict future prosecutions; it will lead to post-conviction litigation on the part of persons who have been successfully prosecuted under Section 1505 and who, under the decision below, presumably are entitled to relief from judgment under 28 U.S.C. 2255. See *Davis* v. *United States*, 417 U.S. 333, 346-347 (1974).

[13] See 18 U.S.C. 1032(2) (concealment of assets from a conservator; reaches conduct that "corruptly impedes or endeavors to impede" the conservator); 18 U.S.C. 1503 (obstruction of justice); 18 U.S.C. 1512 (witness tampering; reaches conduct that "corruptly persuades" another to withhold testimony); 18 U.S.C. 1517 (obstructing the examination of a financial institution; reaches conduct that "corruptly obstructs or attempts to obstruct" the examination); 26 U.S.C. 7212 (interference with administration of the internal revenue laws; reaches anyone who "corruptly * * * impedes, or endeavors to obstruct or impede, the due administration of this title").

[14] 15 U.S.C. 78dd-1(a), 78dd-2(a) (foreign corrupt practices; reaches "use of the mails or other means or instrumentalities of

Given the court of appeals' judgment "that, on its face, the word 'corruptly' is vague" (App., *infra*, 20a), its holding calls into question the constitutionality of all of these statutes. And at a minimum, that decision creates considerable uncertainty—and invites continuing litigation—about whether the legislative history or prior judicial construction of each of these provisions is sufficiently specific to satisfy the court of appeals' standard.

4. With all of that said, it bears emphasis that the standard employed below plainly was the wrong one. The court of appeals used a sort of deconstructive analysis, wrenching the word "corruptly" from its context, declaring the word vague on its face, and then finding insufficient clarity imported by Section 1505's legislative history or prior judicial constructions. This roundabout analysis led the court to the remarkable conclusion that reasonable people would not understand the obstruction of Congress statute to reach those who lie to a congressional committee with the purpose of thwarting a congressional inquiry —and suggests, as Chief Judge Mikva put it below, "that Congress meant to prohibit attempts to obstruct justice by influencing someone else to violate a legal duty, but did not mean to prohibit attempts to obstruct justice by violating one's own legal duty." App., *infra*, 53a. As this

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commerce corruptly" in furtherance of specified acts); 18 U.S.C. 2272, 2273 (destruction of vessels; reaches "corruptly casting away or otherwise destroying" a vessel); 22 U.S.C. 4221 (perjury before a consular officer; reaches persons who "corruptly commit perjury"). See also 10 U.S.C. 931 (perjury by military personnel; reaches persons who "willfully and corruptly" perjure themselves); 18 U.S.C. 201(b), (c), (d) (bribery; reaches person who "corruptly gives" or "asks"); 18 U.S.C. 215(a)(1), (2) (influencing a financial institution; reaches person who "corruptly gives" or "solicits"); 18 U.S.C. 666(a)(1)(B), (a)(2) (theft or bribery relating to programs receiving federal funds; reaches person who "corruptly solicits" or "gives"); 18 U.S.C. 1158 (counterfeiting specified trademarks; reaches person who "corruptly affixes" the trademark); 18 U.S.C. 2271 (conspiracy to destroy vessels; reaches person who "corruptly conspires"); 28 U.S.C. 2514 (forfeiture of fraudulent claims; reaches person who "corruptly practices or attempts to practice any fraud").

Court has explained in similar circumstances, "[s]uch straining to inject doubt as to the meaning of words where no doubt would be felt by the normal reader is not required by the 'void-for-vagueness' doctrine, and we will not indulge in it." *United States* v. *Powell*, 423 U.S. 87, 93 (1975). In fact, the decision below cannot be reconciled with this Court's holdings on any level.

First, we think it plain that the word "corruptly" is not without discernible meaning to people of average intelligence—and that, in particular, "when measured by common understanding and practices" (*Jordan* v. *De George*, 341 U.S. 223, 231-232 (1951)), most people would conclude that those who lie to Congress or destroy documents needed for its investigative efforts have "corruptly * * * endeavor[ed] to influence, obstruct, or impede" an inquiry. With the exception of the majority below, that has been the uniform view of every judge to consider the issue. Indeed, this Court has rejected vagueness attacks against statutes reaching "crimes involving moral turpitude" (see *Jordan*, 341 U.S. at 225, 231) or "crime[s] against nature" (*see Rose* v. *Locke*, 423 U.S. 48, 50-51 (1975) (per curiam)), which surely have no greater clarity than does Section 1505.

Second, the court below simply disregarded the objective criteria that this Court has used in addressing vagueness challenges. In *Jordan*, for example, the Court found it "significant that the phrase [asserted to be vague] has been part of the * * * law[] for more than sixty years" (341 U.S. at 229), and that the phrase "has also been used for many years * * * in a variety of other statutes. No case has been decided holding that the phrase is vague, nor are we able to find any trace of judicial expression which hints that the phrase is so meaningless as to be a deprivation of due process." *Id.* at 230. See *Rose*, 423 U.S. at 50. Those observations are equally applicable here, of course; as we explain above, the relevant language has been part of the law for more than *160* years, appears throughout the U.S. Code, and never before has been held unconstitutional. In deciding whether the statute

"has a meaning sufficiently precise for a man of average intelligence to 'reasonably understand that his contemplated conduct is proscribed'" (*United States* v. *Mazurie*, 419 U.S. 544, 553 (1975) (citation omitted)), it surely is relevant that generations of legislators, judges—and defendants—have had no trouble understanding the reach of its terms.

Third, the Court has noted the significance of prior constructions of an assertedly vague statute, finding it relevant that "[a]nyone who cared to do so could certainly determine what particular acts have been considered" to be proscribed. *Rose*, 423 U.S. at 50. While the court of appeals purported to acknowledge this principle, its analysis missed the mark. The court noted two decisions (of the many that actually are on the books, see pages 12-13, *supra*) affirming Section 1505 convictions that predated Poindexter's conduct, one involving *evasive statements*, the other the submission of *false documents*. See App., *infra*, 34a, citing *United States* v. *Vixie*, *supra*, and *United States* v. *Alo*, *supra*. The court below evidently was of the view that, because Poindexter's actions were not identical to those in either case, the prior prosecutions did not put him on notice that *false statements* violate the statute; the court complained that the rulings "simply do not contain sufficiently clear—or consistent—reasoning to permit such an extrapolation." *Id.* at 34a.

On its face, this analysis is, to say the least, surprising; most people surely would "extrapolat[e]" from the decided cases that, if the presentation of evasive statements and of false documents is subject to prosecution, the submission of false statements and the destruction of documents might be as well. Equally as important, the reasoning used below flatly disregards this Court's express admonition that prior application of a statute to "factually identical conduct" is *not* "a prerequisite to a statute's withstanding constitutional attack. If that were the case it would be extremely difficult ever to mount an effective prosecution based upon the broader of two reasonable

constructions of newly enacted or previously unapplied statutes." *Rose*, 423 U.S. at 51.

Fourth, the court of appeals' ultimately inconclusive examination of Section 1505's legislative history, which it found "[o]n balance * * * seems to support the transitive interpretation of 'corruptly' " (App. *infra*, 33a), misstates the plain import of the statutory background. As initially enacted in 1940, Section 1505's predecessor had two clauses. The first applied to any person who "corruptly * * * shall endeavor to influence, intimidate, or impede any witness"; the second reached any person who "corruptly * * * shall * * * endeavor to influence, obstruct, or impede" an administrative proceeding or congressional inquiry. Act of January 13, 1940, ch. 1, § 135 (a), 54 Stat. 13. As the first clause directly addressed endeavors to suborn or tamper with witnesses, it is hardly likely that the second clause was intended to serve (indeed, be limited to) a similarly "transitive" purpose; Chief Judge Mikva correctly noted below that "the second clause, which contains the wording now in section 1505, would be superfluous if it was construed as the majority would construe it." App., *infra*, 54a.

This understanding is confirmed by the 1982 amendment of the statute, which deleted the first clause of Section 1505 and enacted a new provision, codified at 18 U.S.C. 1512, that prohibits killing, intimidating, "corruptly persuad[ing]," misleading, or harassing a witness so as to hinder his testimony in an official proceeding. Again, it seems plain that Congress would not have transferred the provision addressing witness tampering to another statutory section if it intended the remaining clause of Section 1505 to reach only subornation.[15]

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[15] There is direct evidence in the 1982 legislative history that Congress had no such intent. Addressing the initial version of the Senate bill that became Section 1512, which contained a catchall provision that closely paralleled Section 1505 and the omnibus clause of Section 1503, the Senate Report cited with approval several prosecutions (including *United States* v. *Alo*, *supra*) under those statutes that did not involve subornation. S. Rep. No. 532, 97th Cong., 2d

Finally, the possibility of imagining cases in which the applicability of Section 1505 might be unclear is beside the point here; the Court has held "many times that statutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within the language." *United States* v. *National Dairy Corp.*, 372 U.S. 29, 32 (1963). The Court repeatedly has affirmed that the prospect of conjuring up such hypothetical circumstances cannot defeat an otherwise constitutional prosecution. See *Powell*, 423 U.S. at 93; *United States* v. *Harriss*, 347 U.S. 612, 618 (1954); *Jordan*, 341 U.S. at 231. To the contrary, it is enough "that reasonable persons would know that their conduct is at risk." *Maynard* v. *Cartwright*, 486 U.S. 356, 361 (1988). See *Rose*, 423 U.S. at 50. Section 1505 alerted Poindexter to such a risk here.

B. The Court of Appeals Misapplied the Requirements of *Kastigar*

The constitutional error committed by the court of appeals did not end with its invalidation of Section 1505.

Sess. 18 & n.11 (1982). The catchall provision ultimately was dropped from Section 1512 because it was "probably duplicative of [o]bstruction of justice statutes already in the books." 128 Cong. Rec. 26,810 (1982) (remarks of Sen. Heinz). This makes clear that, at a minimum, the 1982 Congress that amended Section 1505 did not share the court of appeals' view of its "transitive" nature. In contrast, the court of appeals' extensive examination (App., *infra*, 26a-29a) of the 1940 legislative history is wholly unenlightening. Congressional discussion at the time, as the court noted, "focused almost exclusively upon the need to protect witnesses." *Id.* at 27a. But by its plain terms the statute was designed to serve a broader purpose, since only the first of its two clauses dealt with witness protection. In addition, as Chief Judge Mikva explained below, "it is absurd to point, as the majority does, to Senator O'Mahoney's statement that the bill did not intend to restrict the rights of witnesses appearing before Congress, *see* App., *infra*, 28a (citing 84 Cong. Rec. at 10526 (1939)), as evidence that the bill did not intend to criminalize a witness's violation of his legal duty. A witness has never had the right to violate his legal duty—especially his duty not to lie." App., *infra*, at 54a.

The court compounded that mistake by holding that *all* of Poindexter's convictions must be set aside because of what it perceived to be the possibility that some of his immunized disclosures might have affected his trial. In reaching this conclusion, the court reaffirmed its view, first expressed in North, that a prohibited "use" occurs if a witness's recollection is refreshed or in any way affected by exposure to immunized testimony. App., *infra*, at 8a. The decision below added to this substantive standard a procedural requirement of unparalleled strictness: it effectively held that a witness whose trial testimony was not "canned" and who was exposed to immunized disclosures will not be permitted to take the stand at trial unless he "persuasively claim[s] that he can segregate the effects of his exposure." App., *infra*, 16a.[16]

These procedural and substantive holdings will pose enormous obstacles to the prosecution of any case in which immunized testimony has been disseminated publicly—including, most notably, those in which Congress has found the use of public immunized testimony necessary to fulfill its oversight responsibilities. Because the approach taken below cannot be reconciled with the holdings of this and other courts, because it affects important activities of a coordinate branch of government, and because its patent illogic does not in any way advance the policies of the Fifth Amendment, review by this Court is warranted.

1. The court of appeals stated its procedural holding in modest terms: focusing on North's testimony, it said "only that where a substantially exposed witness does not persuasively claim that he can segregate the effects of his exposure, the prosecution does not meet its burden merely by pointing to other statements of the same witness that were not themselves shown to be untainted."

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[16] The court capped these rulings with an extraordinary refusal to remand for further factfinding, "decid[ing] that even though the proper *Kastigar* standards were not enunciated until after the trial in this case, the special prosecutor will not get a chance to apply them." *Id.* at 55a (Mikva, C.J., dissenting in part).

App., *infra*, 16. But while it is difficult to quarrel with that statement in the abstract, the real effect of the holding below is dramatically broader. In fact, the court held that the government could not carry its burden by pointing either to persuasive evidence that a witness was lying when he denied having an untainted recollection of the relevant events or to other forms of circumstantial indicia that the witness had not been affected by the immunized testimony. It bears emphasis that the court of appeals decided more than that the district judge applied the wrong standard in assessing such evidence; by refusing to remand the case, the court concluded as a matter of law that such evidence *never* may be used to carry the government's burden under *Kastigar*. It thus is manifest that, under the court's rule, a witness whose testimony has not been "canned" and who asserts that he has been affected by exposure to immunized disclosures will not be permitted to testify at trial, no matter how improbable or internally inconsistent his claim.

This holding, as Chief Judge Mikva noted, "proclaims a very troubling guideline: * * * The Court today tells future defendants that all they need to evade responsibility is a well timed case of amnesia." App., *infra*, 50a. Needless to say, that rule will have significant practical consequences. It will make almost impossible the prosecution of any case involving public immunized statements that requires testimony by persons sympathetic to the accused, such as co-conspirators or other associates. And the dangers of abuse and manipulation are magnified by the court of appeals' view, expressed in *North*, that a witness inclined to assist the defense may become disqualified from testifying at trial by the simple expedient of soaking *himself* in the defendant's immunized statements.[17] A rule carrying such consequences should be

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[17] As the court of appeals put it, persons sympathetic to the defense "could have held evening classes in 'The Parsing and Deconstruction of *Kastigar*' for the very purpose of 'derailing' the [Independent Counsel's] prosecution, and such a curriculum would have been simply irrelevant to the question of whether or not the

established only if compelled by the Fifth Amendment. Yet the approach taken by the court of appeals finds no support at all in that provision.

2. At the pretrial *Kastigar* hearing, North testified that he was unable to identify *any* subject as to which he had an intact memory. App., *infra*, 83a. An important element of the district judge's decision nevertheless to admit North's testimony was his conclusion that North lied as part of a "calculated course of attempting to assist his former colleague and co-defendant." *Id.* at 133a. See *id.* at 84a (North's claim "inherently incredible"). While the court of appeals did not set aside this credibility determination—which was based both on North's "evasive, disingenuous, and argumentative" demeanor (*id.* at 85a) and on objective indicia in his testimony suggesting that he had an independent recollection (see *id.* at 86a-89a & n.48, 130a-131a)—it held that the district court's finding that North lied when he denied having an untainted memory could not be used as affirmative proof that North *did* have an untainted memory. See *id.* at 15a.

That conclusion, however, is insupportable. As this Court has explained, quoting a famous observation of Judge Learned Hand, demeanor evidence

> "may satisfy the tribunal, not only that the witness' testimony is not true, but that the truth is the opposite of his story; for the denial of one, who has a motive to deny, may be uttered with such hesitation, discomfort, arrogance or defiance, as to give assurance that he is fabricating, and that, if he is, there is no alternative but to assume the truth of what he denies."

NLRB v. *Walton Mfg. Co.*, 369 U.S. 404, 408 (1962) (per curiam), quoting *Dyer* v. *MacDougall*, 201 F.2d 265, 269 (2d Cir. 1952). See also *Sonnentheil* v. *Christian Moerlein Brewing Co.*, 172 U.S. 401, 406, 408 (1899).

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prosecution's case made *use* of North's compelled testimony." *North I*, 910 F.2d at 865 (emphasis in original).

Courts and commentators accordingly agree that, at least where some objective evidence (such as inconsistencies in the witness's story) supports the conclusion that the witness is lying, "a factfinder may find a proposition to be true solely on the basis of a witness' demeanor in testifying to the contrary of that position." Friedman, *Route Analysis of Credibility and Hearsay*, 96 Yale L.J. 667, 735 n.134 (1987). Accord, *e.g.*, *United States* v. *Cisneros*, 448 F.2d 298, 305-306 & n.10 (9th Cir. 1971); *Wood* v. *Commissioner*, 338 F.2d 602, 605 (9th Cir. 1964); J. James & J. Hazard, *Civil Procedure* § 7.11, at 344-345 (3d ed. 1985); J. Weinstein & M. Berger, *Weinstein's Evidence Manual* ¶ 6.01[03], at 6-5 & n.3 (1992); Schnapper, *Judges Against Juries—Appellate Review of Federal Civil Jury Verdicts*, 1989 Wis. L. Rev. 237, 267. Cf. Wellborn, *Demeanor*, 76 Cornell L. Rev. 1075, 1103 (1991). The court of appeals therefore was simply wrong in holding that the government could not use North's prevarication to buttress its affirmative case.

3. There is a similar failure of logic in the court of appeals' evident conclusion that lack of taint may be established only by "canning" evidence or through a witness's affirmative testimony "that he can segregate the effects of his exposure" to immunized statements. App., *infra*, 16a. Surely, for example, trial testimony that did not overlap with the subject matter of the defendant's immunized disclosures, or that disagreed with statements made in those disclosures, or that elaborated upon them, could not have been substantially influenced by the immunized statements. Indeed, it occasionally will be clear simply from the especially memorable character of the events involved that some trial testimony could not have been influenced by the immunized statements. To offer a trivial example, Poindexter's colleagues surely had intact recollections that Poindexter had served as National Security Advisor even after they heard his immunized testimony to that effect.

It is not farfetched to suppose that these elements often will be present in cases such as this. Indeed, the district

court expressly found *all* of these indicia that North had an independent recollection. It found—in findings that were not disturbed by the court of appeals—that North's testimony went well beyond, and in some significant respects differed from, that offered by Poindexter. See, *e.g.*, App., *infra*, 86a-89a, 130a-131a. It found powerful evidence that North lied when he asserted at the *Kastigar* hearing that he saw Poindexter destroy a document but did not realize at the time that the document was the Presidential Finding; the court found that assertion inconsistent with (and less credible than) North's description at his own trial of contemporaneous discussions making clear that both he and Poindexter were well aware that the document being destroyed was the finding. *Id.* at 86a n.44.[18] And the district judge found it "inherently incredible" that North "did not remember his participation in an event that he witnessed first hand and that

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[18] This is a clear example of the manner in which circumstantial evidence may be marshalled to establish that a recalcitrant witness in fact has an independent recollection of events. North's claim at the *Kastigar* hearing (and Poindexter's principal claim on appeal, see CA Br. 68) was not that North's memory regarding destruction of the finding had been *refreshed* by Poindexter's immunized testimony; instead, North claimed that he did not, at the time, understand the document whose destruction he witnessed *to be* the finding. See page 6, *supra*. Yet when asked at his own trial whether the finding destroyed by Poindexter had been the original document, North responded: "That's what I *understood*, yes. It may have been a copy but I *believed* it to be the original." JA 1161 (emphasis added). North added that "I honestly don't know whether I *understood* that to be the only copy or not." JA 1162 (emphasis added). These plainly were references to North's understanding at the time of the destruction of the finding. Indeed, when asked whether the three people present at the finding's destruction (Poindexter, North, and another of Poindexter's aides) had discussed "whether it was a good idea to rip up an original and, for all you knew, only copy of a presidential document," North responded that, "[a]s I recall, the discussion focused solely on the fact that the replacement finding supplemented or succeeded it, and that *this finding* was no longer valid. It was no longer valid and it hadn't been." JA 1163 (emphasis added). This discussion hardly could have taken place had North not been aware that the document involved was the 1985 finding.

was as dramatic, indeed historic, as the tearing up of an extremely rare Presidential Finding, and one, moreover, that authorized the covert sale of arms to Iran where the Ayatollah Khomeini was still in power." *Id.* at 84a. It is difficult to understand how a rule that wholly discounts such factual findings serves the purposes of the Fifth Amendment.

4. In applying its substantive standard, which prohibits " '*any* use' " of immunized testimony in a manner that refreshes a trial witness's memory or affects his account (App., *infra*, 8a, quoting *North I*, 910 F.2d at 861 (emphasis in original)), the decision below also went beyond the holding in *North*—which itself had been "the most expansive reading of the Fifth Amendment to date regarding the evidentiary use of immunized testimony." *United States* v. *Helmsley*, 941 F.2d 71, 82 (2d Cir. 1991), cert. denied, 112 S. Ct. 1162 (1992). In *North*, the court found what it believed to be evidence that a witness changed his account after exposure to immunized testimony. See *North II*, 920 F.2d at 944 & n.5. Here, the court was unable to point to any concrete reason to believe that witnesses had been affected by the immunized disclosures. Instead, the court held that the entirety of North's testimony was inadmissible because of the abstract possibility that "North's repeated exposure to [Poindexter's] testimony in some way influenced North's recollection." App., *infra*, 15a. Indeed, the court of appeals accepted Poindexter's contention that the government " 'must demonstrate affirmatively that the immunized testimony did not * * * [have] an influence on [the trial witnesses'] thinking, even one for which they cannot at this time consciously account.' " *Id.* at 10a (citation omitted).

Realistically, the government almost never will be able to satisfy this standard. Yet it surely is too broad. After all, it usually will be the case that even a witness who has been immersed in immunized testimony will have a residuum of untainted memory; the court of appeals itself seemed to acknowledge as much, noting that the

district court properly could have "reject[ed] as incredible an assertion, had North made it, that he remembered little or nothing of events in which he personally participated for more than a year." App., *infra*, 15a. Similarly, details of a witness's testimony that differ from or add to the immunized disclosures seemingly could not have been influenced by those disclosures.[19] It is impossible to see the purpose served by entirely excluding testimony by such a witness simply because the government cannot demonstrate the absence of subconscious and inarticulable taint.

Similarly, the court of appeals' draconian approach is unwarranted even as applied to those witnesses whose evidence might not have been available (at least in the precise form in which it was presented to the jury) in the absence of the immunized testimony. In assessing assertions that evidence must be excluded as the product of a constitutional violation, the Court repeatedly has "rejected a 'but for' approach to the admissibility of such statements." *Rawlings* v. *Kentucky*, 448 U.S. 98, 106 (1980). It has done so in the Fourth Amendment setting, for example, explaining that the test in such cases is "whether the chain of causation proceeding from the unlawful conduct has become so attenuated or has

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[19] The court of appeals rejected that proposition here. Noting the district judge's ruling that "any of North's testimony that either elaborated upon or contradicted Poindexter's testimony could not, 'by definition,' be tainted and thus was admissible," the court observed: "That a witness proffers a more detailed account than, or a rebuttal of, the defendant's immunized testimony may demonstrate 'personal knowledge' in the evidentiary sense; but it simply does not rule out the possibility that the witness's memory was refreshed or influenced by the immunized testimony." App., *infra*, 11a (citation omitted). The court of appeals offered absolutely no rationale for this *ipse dixit*, however. In fact, determining whether refreshment or influence occurred in such circumstances requires a case-by-case inquiry; in combination with other indicia (such as, in this case, a finding that the witness lied in claiming that he was influenced by exposure), differences between the witness's testimony and the immunized disclosures may well support a finding that the witness had an untainted memory.

been interrupted by some intervening circumstance so as to remove the 'taint' imposed upon that evidence by the original illegality." *United States* v. *Crews*, 445 U.S. 463, 471 (1980). See *Wong Sun* v. *United States*, 371 U.S. 471, 487-488 (1963); *Nardone* v. *United States*, 308 U.S. 338, 341 (1939). The Court also has squarely rejected a " 'but for' analysis" under the Fifth Amendment (*United States* v. *Apfelbaum*, 445 U.S. 115, 125 (1980)), finding attenuation concepts applicable there as well. See *Nix* v. *Williams*, 467 U.S. 431, 442 (1984); *Pillsbury Co.* v. *Conboy*, 459 U.S. 248, 278-279 n.3 (1983) (Blackmun, J., concurring in the judgment); *United States* v. *Bayer*, 331 U.S. 532, 540-541 (1947). These attenuation notions plainly also have force in cases under Section 6002, which was intended to mirror the Fifth Amendment privilege. See *Kastigar*, 406 U.S. at 461.

With this in mind, exposure of a witness to immunized disclosures that happen either to refresh his recollection or to shape his testimony in some subliminal way, especially when not the product of prosecutorial contrivance, is too remote a "use" to require exclusion of the witness's evidence. Because the witness in such a case (as in this one) testifies from his own present and independent recollection of events, the immunized statements are not themselves placed before the jury. Because the government in such a case (as in this one) finds all of its witnesses without reference to the immunized testimony, that testimony does not function as a "link in the chain of evidence." *Doe* v. *United States*, 487 U.S. 201, 208 n.6 (1988). And because the prosecutors in such a case (as in this one) never themselves have seen the immunized statements, the case is hardly one in which the evidence is obtained " 'by exploitation of that illegality.' " *Wong Sun*, 371 U.S. at 487-488 (citation omitted).

In this light, it is not at all surprising that the court of appeals' holdings in *North* and this case are wholly unprecedented. While there have been any number of prosecutions of persons whose immunized testimony was

widely disseminated,[20] until the decisions here and in *North* no court had raised the possibility that refresnment of recollection or similar subtle effects might be a bar to the introduction of evidence. To the contrary, in related settings it generally has been understood that "illegally obtained evidence may be used to refresh a witness' memory." *United States v. Kusek*, 844 F.2d 942, 949 (2d Cir.), cert. denied, 488 U.S. 860 (1988). The court below offered no sound reason to depart from that practice here.

Yet the court of appeals' substantive Fifth Amendment ruling will affect many cases in which the defendant is prosecuted after the dissemination of immunized testimony. And it will have its most profound impact on cases involving public immunized testimony before Congress—cases that, by definition, involve issues of the most fundamental import. If the court of appeals has erred, this Court should right that error before significant further damage is done to the legislative oversight function. In any event, given the nature of the cases affected by the decision below and the impact of that decision upon the operations of a coordinate branch of government—as well the tension between the ruling below and this Court's application of attenuation concepts in closely analogous settings—it is imperative that the issues addressed by the court of appeals be settled by this Court.

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[20] See, *e.g.*, *United States* v. *Biaggi*, 909 F.2d 662, 689-690 (2d Cir. 1990), cert. denied, 111 S. Ct. 1102 (1991); *United States* v. *Serrano*, 870 F.2d 1, 13 (1st Cir. 1989); *United States* v. *Romano*, 583 F.2d 1, 4 (1st Cir. 1978). In other cases, immunized testimony otherwise became known to grand jury or trial witnesses. See, *e.g.*, *United States* v. *Lipkis*, 770 F.2d 1447, 1451 (9th Cir. 1985); *United States* v. *Byrd*, 765 F.2d 1524, 1526-1527, 1529 (11th Cir. 1985); *United States* v. *Rogers*, 722 F.2d 557, 560 (9th Cir. 1983), cert. denied, 469 U.S. 835 (1984).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

LAWRENCE E. WALSH
Independent Counsel

ANDREW L. FREY
CHARLES ROTHFELD
Associate Counsel

Office of Independent Counsel
555 Thirteenth Street, N.W.
Suite 701 West
Washington, D.C. 20004
(202) 383-8940

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APPENDIX

The Fifth Amendment to the United States Constitution provides in relevant part:

> No person * * * shall be compelled in any criminal case to be a witness against himself.

18 U.S.C. 1505 provides in relevant part:

> Whoever corruptly * * * influences, obstructs, or impedes or endeavors to influence, obstruct or impede the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States, or the due and proper exercise of the power of inquiry under which any inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress—
>
> Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

18 U.S.C. 6002 provides in relevant part:

> Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—
>
> (1) a court or grand jury of the United States,
>
> (2) an agency of the United States, or
>
> (3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,
>
> and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.